

PUBLIC DRAFT

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Comments Due by: **February 6, 2020**

SC REVENUE RULING 20-x [DRAFT - 1/23/2020]

SUBJECT: Tobacco Company Payments to Retailers (“Buydowns” and Other Promotional Payments)
(Sales Tax)

EFFECTIVE DATE: January 1, 2020

REFERENCES: S.C. Code Ann. Section 12-36-90 (2014)
S.C. Code Ann. Section 12-36-910 (2014)

AUTHORITY: S.C. Code Ann. Section 12-4-320 (2014)
S.C. Code Ann. Section 1-23-10(4) (2005)
SC Revenue Procedure #09-3

SCOPE: The purpose of a Revenue Ruling is to provide guidance to the public. It is an advisory opinion issued to apply principles of tax law to a set of facts or general category of taxpayers. It is the Department’s position until superseded or modified by a change in statute, regulation, court decision, or another Department advisory opinion.

QUESTION

Are tobacco company payments to retailers (“buydowns” and other promotional payments) that are based on a retailer’s sales, as described in the facts, includible in “gross proceeds of sales,” and subject to sales tax?

FACTS

Under a tobacco company¹ contract with retailers, the tobacco company agrees to pay the retailer a specified amount for each pack of cigarettes² sold by the retailer provided the retailer:
(a) agrees to lower the price of a pack of cigarettes sold to the customer (i.e., buydown) or
(b) meets specific sales goals. The retailer may also agree to post signs advertising the tobacco.

¹ For purposes of this advisory opinion, the term “tobacco company” refers to tobacco manufacturers and distributors.

² In addition to providing promotional payments for cigarettes, tobacco companies also provide these payments with respect to cigars, smoking tobacco, snuff, chewing tobacco, and other types of tobacco. The principles set forth in this advisory opinion also apply to promotional payments for cigars, smoking tobacco, snuff, chewing tobacco, and other types of tobacco.

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The following two examples illustrate these contracts.

Example A - A retailer sells a brand of cigarettes for \$5 a pack. During the buydown promotion period, the retailer agrees to lower the sales price to its customers and sell this brand of cigarettes for \$4.75 a pack. The retailer receives a \$0.25 per pack buydown payment from the tobacco company at a later date. The retailer also agrees to post signs advertising the discounted price.

Example B - A retailer sells a brand of cigarettes for \$5 a pack. During the promotion period, the retailer does not discount the sales price to its customers on this brand of cigarettes. The retailer meets the specific sales goals specified by the tobacco company and receives a \$0.25 per pack payment from the tobacco company at a later date. The retailer also agrees to post signs advertising the cigarettes.

LAW AND DISCUSSION

Code Section 12-36-910(A) imposes a sales tax equal to six³ percent of “gross proceeds of sales” upon every person engaged within this State in the business of selling tangible personal property at retail.

Code Section 12-36-90 reads, in part:

Gross proceeds of sales, or any similar term, means the value proceeding or accruing from the sale, lease, or rental of tangible personal property.

(1) The term includes:

* * * *

(b) the proceeds from the sale of tangible personal property without any deduction for:

- (i) the cost of goods sold;
- (ii) the cost of materials, labor, or service;
- (iii) interest paid;
- (iv) losses;
- (v) transportation costs;

³ Code Section 12-36-1110 increased the general sales and use tax rate by 1%, from 5% to 6%, beginning June 1, 2007.

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(vi) manufacturers or importers excise taxes imposed by the United States; or

(vii) any other expenses.

(2) The term does not include:

(a) a cash discount allowed and taken on sales;

* * * *

Opinion of the Attorney General 82-30 (May 5, 1982) concerns a manufacturer's rebate paid to the purchaser, and reads in part:

There is nothing in the sales tax statutes or regulations permitting a seller to deduct from his gross proceeds an amount paid by a third party to or for the benefit of a purchaser, even though the purpose of the payment is to reimburse the purchaser for a part of the purchase price.

The principle of what is includible in "gross proceeds" was established in *Meyers Arnold, Inc. v. South Carolina Tax Commission*, 285 S.C. 303, 328 S.E.2d 920 (Ct. App. 1985). In this case, the Court of Appeals reasoned:

But for the lay away sales, Meyers Arnold would not receive the lay away fees. The fees are obviously charged for the service rendered in making lay away sales. For these reasons, this court holds the lay away fees are part of the gross proceeds and subject to the sales tax.

Therefore, but for the cigarettes sold by the retailer, the retailer would not receive the buydown or other promotional payments, as described in the facts, from the tobacco company. As such, the payments from the tobacco company to the retailer based on a retailer's sales are includible in "gross proceeds of sales" and therefore subject to sales tax.⁴

CONCLUSION

Tobacco company payments to retailers ("buydowns" and other promotional payments) that are based on a retailer's sales, as described in the facts, are includible in "gross proceeds of sales" and subject to sales tax.

⁴ While not the subject of this advisory opinion, tobacco promotional payments may be based on a retailer's purchases from a tobacco company. For example, a retailer and tobacco company enter into an agreement where the tobacco company will pay the retailer \$1 for each carton of cigarettes purchased by the retailer in a calendar quarter. Since the promotional payment is based on purchases, and not based on sales, the payment is not includible in "gross proceeds of sales" and not subject to sales tax.

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The following two examples illustrate the application of the sales tax to these payments.

Example A - A retailer sells a brand of cigarettes for \$5 a pack. During the buydown promotion period, the retailer agrees to lower the sales price to its customers and sell this brand of cigarettes for \$4.75 a pack. The retailer receives a \$0.25 per pack buydown payment from the tobacco company at a later date. The gross proceeds of sales, upon which the sales tax is calculated, is \$5 for each pack of cigarettes sold by the retailer (i.e., the \$4.75 sales price received from the customer and the \$0.25 to be received from the tobacco company).

Example B - A retailer sells a brand of cigarettes for \$5 a pack. During the promotion period, the retailer does not discount the sales price of this brand of cigarettes. The retailer meets the specific sales goals specified by the tobacco company and receives a \$0.25 per pack payment from the tobacco company at a later date. The gross proceeds of sales, upon which the sales tax is calculated, is \$5.25 for each pack of cigarettes sold by the retailer (i.e., the \$5 sales price received from the customer and the \$0.25 to be received from the tobacco company).

Note: For guidance on manufacturer's coupons, self-redeeming coupons, and discount card programs, see SC Revenue Ruling #99-9.